



March 5, 2001

Mr. Craig Underwood  
Assistant General Counsel  
Teacher Retirement System of Texas  
1000 Red River Street  
Austin, Texas 78701-2698

OR2001-0847

Dear Mr. Underwood:

You ask whether certain information is subject to required public disclosure under the Public Information Act, chapter 552 of the Government Code. Your request was assigned ID# 144668.

The Teacher Retirement System of Texas ("TRS") received a request for "all correspondence" between TRS and the Texas Growth Fund as well as "any reports, memoranda or correspondence in the possession of TRS regarding TRS's investments in the Texas Growth Fund" including "audit papers in so far as they are disclosable" for the past three years. You state that TRS will make available to the requestor "all TRS board and committee minutes, several binders of accounting information [, and] relevant final audit reports." You claim that the remainder of the requested information, or portions thereof, is excepted from disclosure under sections 552.101, 552.104, 552.107(1), 552.110, 552.111, and 552.116 of the Government Code.<sup>1</sup>

In addition, because you believe the privacy and/or property rights of the Texas Growth Fund ("TGF") and those private entities in which TGF invests may be implicated (the "private companies"), you notified TGF of the request. See Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Public Information Act in certain circumstances). The University of Texas Investment Management Company ("UTIMCO") received substantially the same request from the requestor for its records, and UTIMCO also

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<sup>1</sup>In compliance with section 552.301(e)(2) of the Government Code, you have labeled the copies and samples of information submitted to this office to indicate which exceptions, you believe, apply to which information. In reviewing each of the submitted documents, we have accordingly only considered the applicability of the particular exception or exceptions which you marked as applicable to the document. You have also marked some of the submitted documents as having already been made available to the requestor. This ruling does not address these documents.

notified TGF of the request received by UTIMCO. TGF responded to the notices, and asserted sections 552.104 and 552.110 of the Government Code to responsive information held by TRS and/or UTIMCO.<sup>2</sup> You also invited TGF, on TRS's behalf, to provide notice under section 552.305 to the private companies, and we understand that TGF sent thirty-five such notices. However, none of the private companies which received notice from TGF submitted comment to this office. The requestor submitted comment to this office. *See* Gov't Code § 552.304.

TGF identifies four responsive categories of information that TGF asserts is protected from disclosure:

- (A) all summaries, "due diligence notebooks," investment recommendations, investment memorandums[sic], valiative summaries and any documents prepared by TGF, UTIMCO, TRS, their agents, or any third party that provided information on the internal operations of the private companies;
- (B) all materials and information prepared for the attendees of any briefing session of TGF that was provided before or during such briefing session;
- (C) all quarterly and annual financial statements of TGF or the private companies; and
- (D) any other letter or communication from TGF, TGF Corp., UTIMCO, TRS, or any of the private companies or any representatives of TGF, TGF Corp., UTIMCO, TRS or any of the private companies that provides any information regarding the internal operations of the private companies or TGF.

In addition to the above categories of information described by TGF (which you also assert are excepted from disclosure), you have identified three additional categories of responsive information for which you assert one or more exceptions:

- (E) Certain communications between TRS staff attorneys, TRS fiduciary legal counsel and the TRS Board of Trustees;
- (F) Certain agency memorandums [identified by example]; and
- (G) Certain audit working papers.

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<sup>2</sup>This office has considered TGF's arguments with respect to both requests. But please note that this ruling only addresses the information responsive to the request received by TRS. This office shall address the information responsive to the request received by UTIMCO in a separate ruling addressed to UTIMCO.

We have separated and marked the submitted documents for which you assert one or more exceptions into exhibits A, B, C, and D. We have carefully considered the asserted exceptions and the submitted comments, and we have reviewed the submitted information.<sup>3</sup>

Before addressing any of the claimed exceptions, we note at the outset that, evidently, three pages we have marked in exhibit B and two pages we have marked in exhibit C have been previously voluntarily released to the public. Accordingly, these documents may not now be withheld from the requestor. *See* Gov't Code § 552.007. We have marked these documents with yellow flags.

We also note that the Seventy-sixth Legislature amended section 552.022 of the Government Code to make certain information expressly public, and therefore not subject to discretionary exceptions to disclosure. Section 552.022 now states in relevant part:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and are not excepted from required disclosure under this chapter unless they are expressly confidential under other law[.]

Upon review of the submitted information, we note that it contains information that is made expressly public by section 552.022. *See* Gov't Code § 552.022(a)(1), (3), (10). The submitted information that is subject to section 552.022(a) is not excepted from disclosure under the Public Information Act unless "expressly confidential under other law." Sections 552.104, 552.107(1), 552.111, and 552.116 are discretionary exceptions under the Public Information Act and as such do not constitute "other law" that makes any of the information "expressly confidential."<sup>4</sup> Accordingly, the information that is subject to section 552.022(a) may not be withheld from the public under sections 552.104, 552.107(1), 552.111, or 552.116. Sections 552.101 and 552.110 of the Government Code, which you also raise, are considered "other law" that may make information "expressly confidential" for purposes of section 552.022.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." In asserting section 552.101, TRS essentially argues that the submitted information should be deemed confidential in its entirety

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<sup>3</sup>You indicate that some of the submitted documents constitute a "representative sample." We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

<sup>4</sup>Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. *See, e.g.,* Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)), 592 at 8 (1991) (governmental body may waive section 552.104, information relating to competition or bidding), 549 at 6 (1990) (governmental body may waive informer's privilege), 522 at 4 (1989) (discretionary exceptions in general). Discretionary exceptions therefore do not constitute "other law" that makes information confidential.

because the fiduciary duty of members of the TRS Board of Trustees under the Restatement (Third) of Trusts, as well as other law, requires that the TRS trust be administered solely for the benefit of the trust beneficiaries, that the trust assets be held exclusively for the benefit of the trust beneficiaries, and that the trust assets not be diverted. As a general rule, however, statutory confidentiality requires express language making certain information confidential or stating that the information shall not be released to the public. Open Records Decision No. 478 at 2 (1987). None of the provisions of law cited with respect to the section 552.101 assertion contain language that makes any of the information at issue expressly confidential, nor do any of the provisions state that the information shall not be released to the public. As we are aware of no provision that makes any of the information expressly confidential, we conclude the information is not excepted by section 552.101.

TRS and TGF assert sections 552.104 and/or 552.110 of the Government Code for the documents contained in exhibit A.<sup>5</sup> Section 552.104 protects from required public disclosure "information that, if released, would give advantage to a competitor or bidder." The purpose of section 552.104 is to protect the government's interests when it is involved in certain commercial transactions. For example, section 552.104 is generally invoked to except information submitted to a governmental body as part of a bid or similar proposal. *See, e.g.*, Open Records Decision No. 463 (1987). In these situations, the exception protects the government's interests in obtaining the most favorable proposal terms possible by denying access to proposals prior to the award of a contract. When a governmental body seeks protection as a competitor, however, we have stated that it must be afforded the right to claim the "competitive advantage" aspect of section 552.104 if it meets two criteria. The governmental body must first demonstrate that it has specific marketplace interests. *See* Open Records Decision No. 593 at 4 (1991) (governmental body that has been granted specific authority to compete in the private marketplace may demonstrate marketplace interests analogous to those of a private entity). Second, the governmental body must demonstrate actual or potential harm to its interests in a particular competitive situation. A general allegation of a remote possibility of harm is not sufficient to invoke section 552.104. *Id.* at 2. Whether release of particular information would harm the legitimate marketplace interests of a governmental body requires a showing of the possibility of some specific harm in a particular competitive situation. *Id.* at 5, 10. As a discretionary exception, a governmental body may release information which may otherwise be subject to section 552.104 protection. *See* Open Records Decision Nos. 592 at 8 (1991) (governmental body may waive section 552.104); *see also* Gov't Code § 552.007. Thus, as explained above, information that is subject to section 552.022(a) may not be withheld under section 552.104.

Section 552.110, on the other hand, protects the interests of third party information that is responsive to a request made of a governmental body. As such, the governmental body that holds information protected by section 552.110 does not have the discretion to waive the

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<sup>5</sup> TRS relies on TGF to argue the applicability of section 552.110 and TRS makes no section 552.110 arguments. TRS has marked the submitted documents to identify those portions of the information for which each exception is asserted. We understand with respect to the documents marked as excepted by section 552.110 that this is information that TRS obtained from TGF.

exception. Section 552.110 protects: (a) trade secrets, and (b) commercial or financial information the disclosure of which would cause substantial competitive harm to the person from whom the information was obtained. TGF does not argue that any of its information held by TRS constitutes trade secrets. The commercial or financial branch of section 552.110 requires the entity arguing the exception to make a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would result from disclosure. *See* Open Records Decision No. 661 (1999). In Open Records Decision No. 639 (1996), this office announced that it would follow the federal courts' interpretation of exemption 4 to the federal Freedom of Information Act when applying the commercial or financial branch of section 552.110. Federal cases applying the FOIA exemption 4 have required a balancing of the public interest in disclosure with the competitive injury to the entity in question. *See* Open Records Decision No. 494 (1988) (balancing public interest in disclosure of information with competitive injury to company); *see generally* Freedom of Information Act Guide & Privacy Act Overview (1995) 136-138, 140-141, 151-152 (disclosure of prices is cost of doing business with government); *see also* Open Records Decision Nos. 541 (1990), 514 (1988).

With respect to the section 552.104 and 552.110 assertions, and as to whether TRS, UTIMCO, and TGF have specific marketplace interests, TGF advises us that

TGF is an investment trust created to allow public pension funds and permanent education funds in Texas to invest in the private equity marketplace. On November 8, 1988, the voters of Texas approved a constitutional amendment that provided the authority for certain public pension funds and permanent education funds to make private equity investments through a trust established pursuant to the requirements of Article XVI, Section 70 of the Texas Constitution. In December of 1991, the TGF was established through the execution of a Declaration of Trust executed by the participating public funds. A second Declaration of Trust was established in 1995, and a third Declaration of Trust was established in 1998.

Further, you state:

TRS has marketplace interests with regard to the records at issue because the agency is constitutionally responsible for the administration of the system and investment of the funds of the system, including investments in the TGF and other private marketplace investments. Tex. Const. Article XVI, § 67(a)(3) and (b)(1); Texas Government Code § 825.301(a). A member of the TRS Board of Trustees serves on the TGF board. Tex. Const. Article XVI, § 70(c)(3). Further TRS is constitutionally authorized to invest in the TGF, and is currently an active participant in the TGF. TRS has an ongoing interest in the performance of the TGF.

Given the constitutional authority provided TRS and TGF for purposes of investment, we conclude that TRS and TGF can be considered "competitors" in the private marketplace for purposes of section 552.104. Thus, TRS may avail itself of section 552.104 protection for its information, provided TRS demonstrates actual or potential harm to its competitive interests were the information at issue to be released to the public. We further find that TGF's information or the information of private companies that TRS obtained from TGF may be subject to section 552.110 protection, provided a specific factual or evidentiary showing is made, rather than conclusory or generalized allegations, that substantial competitive injury to the private company or TGF would result from disclosure of the information, and the public interest in the information does not outweigh the potential harm to the third party.

On the question of whether TRS and TGF have shown actual or potential harm to their competitive interests you state that

TGF competes in the private equity marketplace, which requires complete confidentiality to achieve success. The private equity marketplace is extremely sensitive to any information pertaining to investors, investments, and especially any information regarding the Private Companies that comprise the private equity marketplace. TGF Management Corp. (the current Executive Director and Investment Manager of the TGF) receives a large amount of information regarding Private Companies and their financial position. TGF Management Corp. then reviews this information, conducts its own due diligence, and then prepares various summaries, memoranda and other documents that are then sent to the Board of Trustees of the TGF and sometimes to investors or potential investors like TRS. The disclosure of the detailed financial information and other information in the information submitted here would completely eliminate the competitive position of the TGF. The whole point of investing in the private equity marketplace is to capitalize on certain Private Companies. If this knowledge were provided to the entire marketplace, the private investment vehicles would lose their "private" nature and all the information that was so diligently and carefully assimilated would be available to any other investor, thus destroying any competitive advantage. The compelled release of such confidential information by the TGF (or by its investors like TRS or by its individual board members) would seriously harm the ability of the TGF to compete for high quality private investments. Since TRS has invested in the TGF, this would harm TRS's interest.

Based upon our review of the submitted information and arguments, we conclude with respect to much of the information for which section 552.104 is asserted that you have demonstrated actual or potential harm to the interests of TRS were the information to be released to the general public. To the extent this information is not subject to section 552.022(a), it is therefore excepted from disclosure under section 552.104. In

addition, TGF has demonstrated through specific factual assertions that much of the information for which section 552.110 is asserted, if released to the public, would result in substantial competitive injury to TGF or the private company from which the information was obtained. The public interest in this information does not generally outweigh this potential harm. For a portion of the information in exhibit A, we find that there has been no demonstration of how release of this information would cause substantial competitive harm for purposes of either section 552.104 or 552.110(b). For your convenience, we have marked with green flags the documents in exhibit A that consist of or contain information that is subject to release, and we have marked the documents accordingly. The remaining information in the exhibit may be withheld under section 552.104 to the extent it is TRS's information not obtained from a third party, or must be withheld under section 552.110(b) to the extent it was obtained from TGF.

TRS asserts section 552.116 for the documents contained in exhibit B. This provision, as amended by the Seventy-sixth Legislature, provides in relevant part:

(a) An audit working paper of an audit of the state auditor or the auditor of a state agency or institution of higher education as defined by Section 61.003, Education Code, is excepted from [required public disclosure]. If information in an audit working paper is also maintained in another record, that other record is not excepted from [required public disclosure] by this section.

(b) In this section:

(1) "Audit" means an audit authorized or required by a statute of this state or the United States and includes an investigation.

(2) "Audit working paper" includes all information, documentary or otherwise, prepared or maintained in conducting an audit or preparing an audit report, including:

(A) intra-agency and interagency communications; and

(B) drafts of the audit report or portions of those drafts.

Gov't Code § 552.116. We understand that the information at issue pertains to an audit of TGF by TRS. After reviewing your arguments and the submitted information, we find that the documents in exhibit B comprise audit working papers for purposes of section 552.116 of the Government Code. As noted above, some the documents are subject to section 552.022(a) and therefore are not excepted from disclosure by section 552.116. We have marked these documents with green flags. We note that some of the section 552.022(a) documents contain handwritten notations, evidently made by the auditor. The handwritten notations are not subject to release under section 552.022(a) and these notations may therefore be redacted from the documents pursuant to section 552.116, prior to their release.

Also as noted above, the exhibit contains three pages, which we have marked and which contain yellow flags, that are subject to release pursuant to section 552.007. TRS may withhold the remaining information in exhibit B pursuant to section 552.116.

You assert section 552.111 for the documents in exhibit C. Section 552.111 excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000); *Arlington Indep. Sch. Dist. v. Texas Attorney Gen.*, No. 03-00-00219-CV, 2001 WL 23169, at \* 5 (Tex. App.--Jan. 11, 2001, no pet. h.). An agency's policymaking functions do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. ORD 615 at 5-6. Additionally, section 552.111 does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Arlington Indep. Sch. Dist.* at \* 6-7; ORD 615 at 4-5. The preliminary draft of a policymaking document that has been released or is intended for release in final form is excepted from disclosure in its entirety under section 552.111 because such a draft necessarily represents the advice, recommendations, or opinions of the drafter as to the form and content of the final document. Open Records Decision No. 559 at 2 (1990). For some these documents, you also assert section 552.107(1) (addressed below). Assuming section 552.107(1) may also be applicable to some of the documents in the exhibit, we note that because section 552.111 generally protects only advice, opinion, and recommendations, any protection under section 552.111 will usually be no greater or less than the protection available under section 552.107(1). See Open Records Decision No. 574 at 2 (1990). We have marked the documents and information in exhibit C that you may withhold pursuant to section 552.111. As noted above, the exhibit contains two pages, which we have marked and which contain yellow flags, that are subject to release pursuant to section 552.007. Some of the information is subject to section 552.022(a)(3), and as such may not be withheld under sections 552.107(1) or 552.111. For your convenience, we have marked with green flags the documents in the exhibit that contain or consist of information that is not excepted from disclosure. Where such documents contain information that is excepted from disclosure, we have marked for redaction the particular information at issue. The remaining information in the exhibit may be withheld under section 552.111.

Finally, you assert section 552.107(1) for the documents contained in exhibit D. Section 552.107(1) excepts information that an attorney cannot disclose because of a duty to his client. In Open Records Decision No. 574 (1990), this office concluded that section 552.107(1) excepts from public disclosure only "privileged information," that is, information that reflects either confidential communications from the client to the attorney or the attorney's legal advice or opinions; it does not apply to all client information held by

a governmental body's attorney. Open Records Decision No. 574 at 5 (1990). Section 552.107(1) does not except purely factual information from disclosure. *Id.* Section 552.107(1) does not except from disclosure the factual recounting of events or the documentation of calls made, meetings attended, and memos sent. *Id.* at 5. In this instance, the documents in exhibit D comprise legal opinion memoranda, or drafts of such memoranda, pertaining to TRS's investment in TGF. We find that to the extent there exists purely factual information in these documents, such information is not reasonably severable from the advice or opinion contained in the memoranda. We thus conclude that the documents in exhibit D may be withheld in their entirety pursuant to section 552.107(1).

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

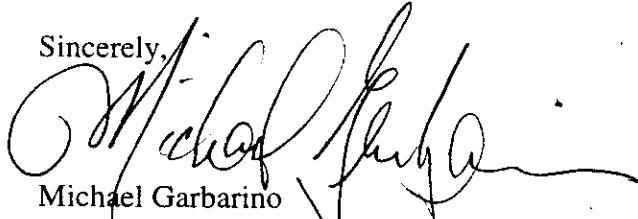
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be

sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Michael Garbarino  
Assistant Attorney General  
Open Records Division

MG/seg

Ref: ID# 144668

Encl. Submitted documents

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